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No. 89-344

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES M. WOODWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Navy acted constitutionally when it released petitioner from active duty after he admitted that he was homosexual.

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OPINIONS BELOW

The opinion of the United States Claims Court (Pet. App. 96a-115a) is unreported. The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 871 F.2d 1068.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1989. A petition for rehearing was denied on May 2, 1989. Pet. App. 116a-117a. On July 21, 1989, Justice White extended the time for filing a petition for a writ of certiorari until August 30, 1989, and the petition was filed on that date. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1972, petitioner enlisted in the United States Naval Reserve and entered the Naval Flight Officer Candidate Program. At that time, he responded "yes" to a questionnaire that asked whether he was sexually attracted to men or whether he desired sex with men. He responded "no," however, to a question whether he had ever engaged in homosexual conduct. Pet. App. 2a. Although Navy regulations generally excluded homosexuals from military service (Pet. App. 2a n.1), the Naval Reserve allowed petitioner to enter its flight program.[1]

Petitioner completed flight school and was commissioned as an ensign in the Naval Reserve. In 1974, while serving in an air squadron stationed in the Philippines, petitioner went to the Subic Bay Officer's Club with an enlisted man who was awaiting discharge from the Navy for homosexual conduct. Pet. App. 3a. Because enlisted personnel were not authorized to use the club, petitioner and his

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[1] Prior to 1981, Navy regulations made "discharge of known homosexuals mandatory, subject only to a kind of [unreviewable] executive discretion vested in the Secretary which is unrelated to the fitness of any particular individual." *Beller* v. *Middendorf*, 632 F.2d 788, 802 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). Homosexuality, as defined by pre-1981 regulations, included "the expressed desire, tendency, or proclivity toward [homosexual] acts whether or not such acts are committed." Pet. App. 2a n.1. Homosexual tendencies were considered to include any demonstrated "inclination, propensity, or proclivity to a participation in a homosexual act." Navy's Answers to Interrogatories at 3 (*Woodward* v. *Moore*, No. 76-1199 (D.D.C.)). In 1981, the Navy made homosexuality a non-waivable disqualification for military service. See Navy Military Personnel Manual 36-42; SECNAVINST No. 1920.6A, OP-130C3, at 2-3 (Nov. 21, 1983).

guest were asked to leave. When petitioner was later questioned by his commanding officer about the incident, he "admitted his homosexual tendencies and stated that since he knew no 'gay' officers he had sought the company of 'gay' enlisted men." *Ibid.*

Petitioner's commanding officer then asked him to resign. When petitioner declined, the commanding officer recommended to the Chief of Naval Personnel that petitioner be discharged under honorable conditions. Pet. App. 3a, 47a. In September 1974, petitioner submitted to the Chief of Naval Personnel a letter requesting that the Navy retain him even though he was homosexual. Petitioner wrote (Pet. App. 4a):

> I am, and have been, since I became sexually aware, primarily homosexually oriented. . . . I do, and will continue to, associate with other homosexuals.
>
> * * * *
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> I am well aware of the problems of social acceptance and special problems of leadership with which I will be confronted as my associates become aware of my homosexuality.
>
> * * * *
>
> For the good of both the Navy and myself, I respectfully request the chance to contribute to the defense of the United States as an honest, open, "gay" officer. I recommend that the matter of my homosexuality be dropped as a matter of official concern.

The Navy did not then discharge petitioner. In accordance with standard Navy policy, however, the Navy reviewed whether petitioner should be reassigned or released from active duty. Pet. App. 5a, 102a. The Navy later determined that petitioner

should be released from active duty and assigned to a reserve position, concluding that (*id.* at 6a):

> [petitioner] had acknowledged his homosexuality; his fitness reports, which were prepared by [petitioner's] commanding officer prior to [petioner's] admission of homosexuality were "far from outstanding," leaving him uncompetitive with other reserve officers available for reassignment or release; and his release would appropriately implement the Navy policy (at that time) of reducing the number of reserve officers on active duty.

On October 22, 1974, the Navy released petitioner from active duty and assigned him to the Naval Air Reserve Staff in San Diego, California. *Ibid.* He served there until 1978, when the Navy discharged petitioner after he completed his six-year military obligation. *Id.* at 7a.

2. a. In June 1976, petitioner brought suit in the United States District Court for the District of Columbia and claimed that he had been unlawfully separated from active duty. He sought back pay and reinstatement to active duty in the Naval reserve. Pet. App. 7a. After lengthy litigation, including two appeals, petitioner's action was transferred to the Claims Court on the ground that the district court lacked jurisdiction under 28 U.S.C. 1346 because petitioner's back pay claim exceeded $10,000. Pet. App. 7a-8a.

In the Claims Court, petitioner challenged the lawfulness of his separation from active duty on two grounds. Pet. App. 97a. First, he contended that the Navy acted capriciously in failing adequately to explain the reason for his separation. Second, he contended that the Navy violated his rights under the

First and Fifth Amendments because it acted on the basis of his homosexuality.

The government argued that the decision to release a reservist from active duty is committed to the unreviewable discretion of the Secretary of the Navy.[2] Alternatively, the government argued that petitioner was permissibly released because of "his record, because of a general reduction in force in effect at the time, [and] because of his homosexuality." Pet. App. 98a.

b. The Claims Court rejected the government's argument that the Secretary's decision to release a reservist from active duty is not reviewable. Pet. App. 105a. The court acknowledged that 10 U.S.C. 681(a) confers "wide discretion" (Pet. App. 106a-107a) on the Secretary, and that the judiciary is obliged to accord deference to the Secretary's judgment regarding military personnel matters. Nevertheless, the court ruled that it had jurisdiction under the Tucker Act, 28 U.S.C. 1491,[3] to consider the merits of petitioner's claims. Pet. App. 107a.

The Claims Court assumed, without deciding, that petitioner's acknowledgement of homosexuality was constitutionally protected. It then reviewed the

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[2] The Navy relied on 10 U.S.C. 681(a), which provides: "Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty."

[3] Section 1491(a)(1) provides:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, * * * or for liquidated or unliquidated damages in cases not sounding in tort. * * *

Navy's decision to release petitioner from active duty under the causation guidelines outlined in *Mt. Healthy City School Dist. Bd of Educ.* v. *Doyle*, 429 U.S. 274 (1977). The court found that the Navy showed by a preponderance of the evidence that it would have reached the same decision without regard to the conduct claimed to be constitutionally protected, because petitioner's performance was below the level necessary for a reservist to be retained on active duty. Pet. App. 109a-113a. Thus the Claims Court granted the Navy's motion for summary judgment. *Id.* at 113a.[4]

3. The court of appeals affirmed the judgment on other grounds.[5] The court first found that the Claims Court's analysis under *Mt. Healthy* was flawed because it "fail[ed] to take into account that [petitioner's] file would not have reached the reviewing office [the Chief of Naval Personnel] at all had he not been homosexual and admitted it to his commanding officer." Pet. App. 23a. The Court noted: "Only because of his homosexuality was [petitioner's file] referred for review and it was, in part, the basis for his release from active duty." *Id.* at 25a.[6]

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[4] In light of the court's holding that the Navy would have separated petitioner from active duty even apart from his homosexuality, the court did not address petitioner's claim that he was entitled to an explanation of why he was denied the benefit of the Navy's pre-1981 discretionary policy of retaining some homosexuals. Pet. App. 113a.

[5] As a threshold matter, the court held, relying on *Webster* v. *Doe*, 108 S. Ct. 2047 (1988), that the Claims Court had jurisdiction over petitioner's claim for damages resulting from allegedly unconstitutional conduct.

[6] The court, however, rejected petitioner's contention that he should have been afforded the benefit of the Navy's pre-

In reviewing petitioner's constitutional claims, the court of appeals noted that a serviceman's "constitutional rights must be viewed in the light of the special circumstances and needs of the armed forces." Pet. App. 40a (quoting *Beller* v. *Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981)). The court of appeals observed that the judiciary is obliged to give the military "[s]pecial deference * * * when adjudicating matters involving * * * decisions on discipline, morale, composition and the like, and a court should not substitute its views for the 'considered professional judgment' of the military." Pet. App. 39a-40a (quoting *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986)). The court determined that those principles were particularly applicable here, because "the Secretary [in 10 U.S.C. 681(a)] was given extremely broad discretion by Congress to release a reserve officer from active duty at any time, and the applicable regulations do not in any way limit that discretion." Pet. App. 40a.

The court of appeals then rejected petitioner's contention that the Navy's action violated the First Amendment because it was based on petitioner's admission of homosexuality. The court wrote:

> [Petitioner] does not seriously contend on appeal that his statements are entitled to First Amendment protection. Because [petitioner's] state-

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1981 practice of retaining some homosexuals. The court stated: "[Petitioner] was not discharged for homosexuality; rather he was considered for reassignment, but because of his mediocre record as an officer *and* his homosexuality he was ultimately released from active duty pursuant to 10 U.S.C. § 681. Consequently, there is no inconsistency between [petitioner's] treatment and the Navy's [pre-1981] practice of considering some homosexuals for retention." Pet. App. 13a-14a n.3.

> ments were made "for personal reasons and not to inform the public of matters of general concern" they are not entitled to First Amendment protection. * * * "Mere publication does not clothe them with First Amendment protection."

Pet. App. 11a n.2.

The court of appeals next held that petitioner's separation from active duty did not violate the equal protection component of the Fifth Amendment.[7] First, the court ruled that the classification challenged by petitioner—a distinction based on homosexual "conduct or behavior" (Pet. App. 36a)—was not entitled to heightened judicial scrutiny. *Id.* at 33a-37a.[8] The court then held that the Navy's classification passed constitutional muster because it was rationally related to a permissible end:

> The Navy's policy requiring discharge of those who engage in homosexual conduct serves legitimate state interests which include the mainte-

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[7] The court of appeals also rejected the claim that the Navy violated petitioner's right to privacy. Pet. App. 25a-32a. Petitioner does not challenge that ruling.

[8] The court acknowledged (Pet. App. 26a n.6) that petitioner had not admitted engaging in homosexual acts. Nevertheless, the court noted that petitioner repeatedly admitted his homosexuality and "at various times stated that 'he was attracted sexually to, or desired sexual activity with, members of his own sex,' that 'since he knew no "gay" officers he sought the company of "gay" enlisted men,' [and] that he '[does], and will continue to, associate with other homosexuals,' * * *." *Ibid.* The court also noted that petitioner had declined to assert that he was celibate. *Ibid.* Under those circumstances, the court had little difficulty concluding that Navy's classification, as applied to petitioner, was "behavioral" in nature. *Id.* at 35a.

> nance of "discipline, good order and morale[,] . . . mutual trust and confidence among service members, . . . insur[ing] the integrity of the system of rank and command, . . . recruit[ing] and retain[ing] members of the naval service . . . and . . . prevent[ing] breaches of security." * * * We believe that the policy requiring discharge for homosexual conduct is a rational means of achieving those legitimate interests. * * * The unique needs of the military, "a specialized society separate from civilian society," * * * justify the Navy's determination that homosexual conduct impairs its capacity to carry out its mission.

Pet. App. 38a-39a (quoting *Dronenburg* v. *Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984)). Accordingly, the court affirmed the judgment that the Navy acted lawfully in separating petitioner from active duty.

ARGUMENT

The decision of the court of appeals is correct. In addition, the decision does not conflict with any decision of this Court or of any other court of appeals. Thus, no further review is warranted.

1. Petitioner first contends (Pet. 10-12) that the court of appeals erred in finding petitioner "guilty of criminal homosexual acts." *Id.* at 11. That contention is both misleading and without merit.

The court of appeals did not find that petitioner had engaged in homosexual sodomy, which is a crime under the Uniform Code of Military Justice. 10 U.S.C. 925. Rather, it ruled that the Navy's action was based on more than petitioner's expression of an abstract sexual preference—*i.e.*, that it had a behavioral component. See Pet. App. 26a n.6, 35a. The court of appeals' reading of the record was

amply supported. Petitioner's own statements showed that: (1) he was homosexual (*id.* at 4a), (2) he was sexually attracted to or desired sexual contact with other men (*id.* at 2a), (3) he sought out the company of homosexual men (*id.* at 3a), and (4) he had homosexual tendencies (*ibid.*). In addition, petitioner has, since 1972, declined to assert that he has refrained from homosexual conduct (*id.* at 26a n.6). Accordingly, the court of appeals' review of petitioner's constitutional claims was not premised on a faulty view of the facts.[9]

2. Petitioner next contends (Pet. 13-15) that the court of appeals had an inadequate record to resolve his equal-protection claim.[10] The court of appeals,

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[9] The Seventh Circuit's recent discussion in *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (1989), is instructive:

> It is true that actual [homosexual] conduct has not been admitted by plaintiff on any particular occasion, and the [military] has offered no evidence of such conduct. * * * Plaintiff's [homosexual] acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. * * * The [military] need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here.

[10] Petitioner apparently does not seek review of the court of appeals' decision not to apply strict scrutiny to the Navy's action. The court's refusal to accord heightened scrutiny to classifications based on homosexuality is consistent with the decisions of every court of appeals that has considered the issue.

however, correctly held (Pet. App. 38a) that the Navy's regulations regarding homosexuals were rationally related to a legitimate purpose.

The military has long and often explained the basis for its regulations regarding homosexuals. Over seven years ago, the Department of Defense issued a directive stating that the presence of homosexuals in the military will

> adversely affect[] the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of

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See *Ben-Shalom* v. *Marsh*, 881 F.2d 454 (7th Cir. 1989); *Gay Veterans Ass'n, Inc.* v. *Secretary of Defense*, 850 F.2d 764 (D.C. Cir. 1988); *Padula* v. *Webster*, 822 F.2d 97 (D.C. Cir. 1987); *Baker* v. *Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986); *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Beller* v. *Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). Although a divided panel of the Ninth Circuit reached the opposite conclusion in *Watkins* v. *United States Army*, 847 F.2d 1329 (1988), that decision was vacated upon rehearing en banc in *Watkins* v. *United States Army*, 875 F.2d 699 (9th Cir. 1989). In this case, the court of appeals relied on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), to fortify its conclusion that the Navy's homosexual policy was not subject to strict scrutiny. In *Bowers*, this Court held that "the Federal Constitution [does not] confer[] a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190.

> military service; and to prevent breaches of security.

Department of Defense Directive (DOD) No. 1332.14, at 1-9 to 1-10 (Jan. 28, 1982). Accord Navy Military Personnel Manual 36-42.

The Ninth Circuit in *Beller* v. *Middledorf*, 632 F.2d 788 (1980), found those justifications to be sufficient to sustain as rational the Navy's regulations pertaining to homosexuals. It stated:

> The Navy can act to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of the men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own. The Navy, moreover, could conclude rationally that toleration of homosexual conduct, as expressed in a less broad prohibition, might be understood as tacit approval.
>
> * * * * *
>
> The Navy is concerned about tensions between known homosexuals and other members who "despise/detest homosexuality;" undue influence in various contexts caused by an emotional relationship between two members; doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands; and possible adverse impact on recruiting. These concerns are especially serious, says the Navy, where enlisted personnel must on occasion be in confined situations for long periods.
>
> * * * Despite the evidence that attitudes towards homosexual conduct have changed among some groups in society, the Navy could con-

> clude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties. * * * [These] concerns expressed by the Navy might not apply in any particular case, but [they] do have some basis in fact. These considerations are adequate to sustain the regulation in its military context.

632 F.2d at 811-812.[11]

Contrary to petitioner's suggestion (Pet. 13-15), the Navy was not required to justify its regulations further by submitting factual affidavits or scientific studies. That is clear from this Court's decision in *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), where the Court rejected the contention that the Air Force was required to submit empirical evidence to support the wisdom of its dress regulations. The Court in *Goldman* stated: "The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Id.* at 509.

3. Lastly, petitioner errs in asserting (Pet. 15-17) that this case raises serious First Amendment

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[11] In light of those well-established and longstanding considerations underlying the Navy's regulations, petitioner clearly errs in contending (Pet. 15) that "[t]he Federal Circuit improperly decided [petitioner's constitutional] claim[s] in a vacuum, absent any evidence of interests served by the Navy's action."

concerns. The Navy separated petitioner from active duty because, among other things, he said that he was homosexual, he declared that he was attracted sexually or desired sexual activity with other men, and he sought out the company of homosexual enlisted men. Thus, the Navy reasonably concluded that petitioner was likely to commit homosexual acts—a practice that the Navy believes is detrimental to its military mission. The court of appeals correctly held (Pet. App. 11a-12a n.2), as has every court of appeals that has considered the issue,[12] that the military does not violate the First Amendment when it takes action against a servicemember who it reasonably believes has committed or is likely to commit homosexual acts.

The Navy's regulations plainly do not penalize servicemembers for engaging in protected First Amendment expression. As the Seventh Circuit noted in *Ben-Shalom* v. *Marsh*, 881 F.2d 454 (1989), petitioner

> is free under the regulation to say anything [he] pleases *about* homosexuality and about the [Navy's] policy toward homosexuality. [He] is free to advocate that the [Navy] should change its stance; [he] is free to know and talk to homosexuals if [he] wishes. What [he] cannot do, and remain in the [Navy], is to declare [himself] to *be* a homosexual. Although that is, in

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[12] *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 458-462 (7th Cir. 1989); *Rich* v. *Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984). Accord *Hatheway* v. *Secretary of the Army*, 641 F.2d 1376, 1383-1384 (9th Cir.), cert. denied, 454 U.S. 864 (1981).

> some sense speech, it is also an act of identification. And it is the identity that makes [him] ineligible for military service, not the speaking of it aloud.

Id. at 462.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] Petitioner's non-constitutional claim (Pet. 17-18) is insubstantial. Petitioner incorrectly asserts (Pet. 18) that the "court failed to require the Navy to articulate its retention criteria and apply them to [petitioner's] case." The Navy's policy regarding service by homosexuals is a matter of record. See Pet. App. 2a n.1; note 1, *supra*. Moreover, as the court of appeals correctly found (Pet. App. 13a-14a n.3), there was no inconsistency between the Navy's treatment of petitioner and its pre-1981 practice of allowing some homosexuals to remain in the Navy.

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